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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

William F. Caton, Secretary
Federal Communications Commission
1919 M Street N.W., Room 222
Washington, D.C. 20554

**Re:** In the Matter of Impelementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation of Leased Commercial Access
(MM Docket 92 266; CS Docket No. 96-60)
Comments of Hispanic Information and Telecommunciations Network, Inc.

Dear Mr. Caton:

Enclosed, on behalf of The Hispanic Information and Telecommunications Network (HITN), are the original and eleven (11) copies of HITN's Comments in the above referenced rulemaking.

If you have any questions about this filing, please let me know.

Sincerely,

Ernest T. Sanchez

Ernest T. Sanchez
Counsel for
Hispanic Information and
Telecommunications Network

Enclosure

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**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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| | ) | |
| Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 | ) | MM Docket 92-266 |
| | ) | |
| Rate Regulation | ) | |

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**COMMENTS**
**OF**
**HISPANIC INFORMATION AND TELECOMMUNICATIONS NETWORK, INC.**

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## SUMMARY OF COMMENTS

Hispanic Information and Telecommunications Network (hereafter, "HITN") files comments on various issues related to the Commission's proposed leased access rulemaking in response to certain of the tentative conclusions and issues upon which comment was solicited contained in the Commission's Order on Reconsideration.

In these comments, HITN supports the Commission's proposed replacement of the current "highest implicit fee" formula as the method for setting maximum rates for commercial leased access. HITN also explains that it considers the "cost/market rate" formula to represent only a slight improvement over the highest implicit fee formula, but only with respect to cost-based leased access rates. HITN cautions that both the cost-based and the market-rate aspects of the Commission's proposed formula fail to correct market imperfections and the inequality of bargaining status caused by cable's market power, which is partly structural but partly caused by anticompetitive practices by cable operators.

HITN takes the position that the Commission should reconsider its interpretation of the statutory language governing its obligations with respect to leased access rate-setting so that FCC concern for cable's growth and development not be permitted to overbalance its obligation to foster competition and diversity in cable programming through the mechanism of leased access. HITN supports a separate set-aside, within the present 15% statutory set-aside, for not-for-profit programming entities and proposes that the non-profit set-aside should be equal to at least one-third of the statutory set-aside channels. HITN also proposes that non-profit programmers who lease a set-aside channel should not be subjected to market-based maximum rates but, rather, rates chargable to not-for-profit programmers should be nominal, based only upon the cable operator's actual incremental costs related to providing the services
HITN believes that adoption of its suggested policies regarding non-profit set-aside, cost-based nominal rates, reporting requirements, dispute resolution will best promote the policies of competition and diversity.

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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**COMMENTS**
**OF**
**HISPANIC INFORMATION AND TELECOMMUNICATIONS NETWORK, INC.**

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The Hispanic Information and Telecommunications Network, Inc., by and through its counsel, Ernest T. Sanchez, files these Comments in the above-captioned rulemaking proceeding of the Federal Communications Commission.

## I. INTRODUCTION AND BACKGROUND.

1. The Hispanic Information and Telecommunications Network, Inc. (hereafter, "HITN"), is a private not-for-profit organization which was established in 1983 in order to create a network of noncommercial television facilities which would advance the educational, social, cultural, and economic aspirations of American Hispanics. HITN is an educational and cultural programming network which presently holds Instructional

Television Fixed Service (ITFS) licenses to operate wireless cable television channels in 41 cities, 27 of which have already been constructed and are operational, and offers 24-hour programming in both the Albany and New York City areas. HITN currently provides bi-lingual English and Spanish instructional, including interactive distance learning services, to schools and has sophisticated program production and transmission (including satellite) capabilities and facilities. Exhibit A, a fact sheet entitled "About HITN", which is attached to these comments, provides more detailed information about HITN and its goals, history, and programming.

2. HITN believes that it could be even more effective in reaching the population it seeks to serve if it were able to distribute its cultural, informational, and instructional programming via cable television. HITN has been generally unsuccessful, however, in its attempts to obtain access to cable channels, either those within the public, educational and governmental ("PEG") channels (despite the partial funding HITN receives from government sources), or commercial leased access channels. It has found the latter channels, when available, to be prohibitively expensive. HITN is currently in the process of gathering more precise and quantifiable information and data regarding its attempts to obtain meaningful cable TV access and will provide this informaiton in its Reply Comments in this proceeding.

3. HITN has decided to enter these Rulemaking proceedings because it believes that it is uniquely situated to provide useful and meaningful input to the Commission, its staff, and the industry. HITN's perspective is not only that of a not-for -profit entity but also that of network which provides a primarily education-focused

programming service directed at a minority audience. HITN is, furthermore, an established entity of proven quality and technical acumen. It thus represents and personifies, within a single entity, many types of programming sources and several of the regulatory issues which confront the Commission under the relevant statutory mandate in this proceeding.

## II. SUMMARY OF HITN POSITIONS.

4. In these Comments, HITN expresses its position with respect to the following issues:

> 1) HITN supports replacement of the current "highest implicit fee" formula as the method for setting maximum rates for commercial leased access;
>
> 2) HITN considers the "cost/market rate" formula to represent some improvement over the highest implicit fee formula, but only with respect to cost-based leased access rates. HITN cautions that both the cost-based and the market-rate aspects of the Commission's proposed formula fail to correct market imperfections and the inequality of bargaining status caused by cable's monopoly/monopsony[1]-derived market power;
>
> 3) HITN strongly suggests that the Commission reconsider its interpretation of the statutory language governing its obligations with respect to leased access rate-setting so that concern for cable's growth and development not be permitted to overbalance its obligation to foster competition and diversity in cable programming through the mechanism of leased access;
>
> 4) HITN supports a separate set-aside, within the present 15 percent statutory set-aside, for not-for-profit programming entities and proposes that the non-profit set-aside should be equal to at least one-third of the statutory set-aside channels;

[1] "Monopsony" means, essentially, a monopoly from the buyer's side. Where a single buyer deals with multiple sellers of the same or similar products or services, the buyer will be able to exert market power to control the price that will be paid for the product or service and to exclude competitors.

5) HITN proposes that non-profit programmers who lease a cable set-aside channel should not be subjected to market-based maximum rates but, rather, rates that may be charged to not-for-profit programmers should be nominal, based only upon the cable operator's actual incremental costs related to providing the services;

6) HITN believes that adoption of its suggested policies regarding non-profit set-aside cost-based nominal rates, reporting requirements, dispute resolution and other matters upon which the Commission specifically requested comments, will best promote the policies of competition and diversity in cable programming.

## III. THE HIGHEST IMPLICIT FEE FORMULA REWARDS CABLE OPERATORS FOR PAST AND PRESENT ANTICOMPETITIVE PRACTICES AND, THEREFORE, SHOULD BE REPLACED BY A FORMULA WHICH IS NOT SO TAINTED.

5. HITN agrees with the Commission's tentative conclusion that the highest implicit fee formula both overcompensates cable operators and does nothing to promote the statutory purpose underying the leased access provisions of the 1992 Cable Act. It believes, however, that the remedies proposed by the Commission are too tentative and, thus, would continue to fall short of achieving the goal sought by Congress. That goal, "the promotion of competition in the delivery of diverse sources of video programming"[2] is not limited to competition among leased access hopefuls but, rather, is specifically intended to foster various sources of competition with existing cable programming, particularly with those affiliated sources of promgramming in which the cable operator has a financial interest. This, in fact, is precisely where competition and program diversity are most needed -- to compete with operator-affiliated programming in order to

[2] Communications Act, §612, 47 U.S.C. §532, as amended by the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), 47 U.S.C. §521 *et seq.* (1992).

counteract the bottleneck that cable operators have been able to exert over access to these markets until now.

6. As the Commission's Opinion points out in Its Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking in Docket 92-266 (FCC 96-122) (March 29, 1996) (hereafter, "Order on Reconsideration"), Congress in 1992 was concerned that cable operators may have acted from anticompetive motives and may have engaged in anticompetitive acts and practices in refusing to deal on fair and reasonable terms with potential leased access users.[3] That state of affairs has continued until the present day, as is evidenced by the persistently low level of leased access utilization in most cable markets. And, while HITN agrees with the Commission that the implicit fee formula must go because it allows double recovery, provides cable systems with the highest possible markup, and is not based upon reasonable costs[4], it also believes that the Commission has failed to realize that <u>any</u> formula which purports to permit recoupment of lost opportunity costs (such as costs of "bumping" non-leased channels) inevitably reflects and rewards the operator for those very acts and practices which were used to exclude leased access users from the set-aside channels. Rates determined and set by a monopolist/monopsonist, with no effective outside control over those rate, will permit it to recoup revenues and profits far above

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[3] Order on Reconsideration at 4, 1996 FCC Lexis 1544 at 3.

[4] Order on Resonsideration at 7 - 8.

the levels that would exist in a truly competitive, unmonopolized market. Some consideration of antitrust law and policy may be useful to put these concepts into perspective.

### A. Most Cable Systems Are Monopsonies as well as Monopolies, But Are Only Regulated In the Latter Capacity.

7. Most cable systems hold legal monopolies over cable television programming with respect to their subscribers and communities of operation. That is (temporarily disregarding competing sources of video programming), the typical cable system has been granted and holds the sole franchise to provide programming over a cable system for a particular geographic market. The existence of this legal monopoly is generally the rationale for regulation of cable rates and of the marketing practices of the operator -- in large part, to ensure that the monopolist's market power will not be used, in pricing or in other practices, to the detriment of consumers. That is the market situation on one side of the equation -- those that must deal as buyers with the cable system as seller require protection because of the latter's market power.

8. A buyer, however, may also hold and wield market power. The sole buyer in a market with which multiple sellers must deal is termed a "monopsony"; market power that is used by such sole buyers to promote anticompetitive ends by anticompetitive means violates the United States antitrust laws no less than unlawful monopolist practices. The classic buyer's-side antitrust case, Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948), condemned maximum price fixing by buyers -- that is, buyers jointly setting the maximum levels they were willing to

pay for raw materials. Monopsony power refers to the power of a buyer to restrict demand for a product or service.

9. A cable system is often the only local buyer to whom programming may be sold for effective distribution in a particular market and, thus, will be able to deal with such programming sellers from a position of monopsony. That is, the cable system has the power to determine what, if any, price will be paid for the product and, ultimately, whether that product will ever be placed on its system so as to be viewed within a particular geographic market. This is true whether one views the cable operator as a buyer of prgramming or as seller of leased access (which is simply one way of acquiring -- "buying" -- products for a cable system when the cable operator refuses to otherwise deal with programming source). Market power, whether on the buyer's side or the seller's side, is the power to control prices or exclude competition within a particular relevant market.[5] It is HITN's position that many cable operators, particularly MSO's, have discriminated shamelessly against unaffiliated programming sources in favor of programming in which the operator has a financial and/or ownership interest, and that such practices have resulted in the cable market programming configurations we see today, with little or no leased access in use by -- or affordable to -- the typical low-

[5] See, e.g., United States v. E.I. dePont de Nemours & Co., 351 U.S. 377, 391 (1956); American Tobacco Co., v. United States, 328 U.S. 781, 811 (1946) (monopoly power is the power to "exclude actual or potential competition from the field"). Under the antitrust laws, proof that a particular defendant accounts for a high percentage of total firm sales or purchases within a defined market (that is, has a high "market share") can be considered compelling evidence of market power; so too is evidence that the defendant has actually been able to exercise control over prices within an industry or to have actually excluded competitors or potential competitors. Many cable systems, holding a one hundred percent share of the cable market and an 85 or 90 % share of the non-broadcast programming market in a particular geographic area, have been able to determine without fear of competition the supra-competitive rates at which they will lease access to their facilities, and thus have been able to eliminate or largely exclude from the market those programmers who might compete with affiliated programs in which the operator has a financial interest.

budget or not-for-profit unaffiliated programmer. New FCC-proposed rates should not perpetuate or reward such practices.

**B. For Most Unaffiliated Programmers, Cable Channel Access Constitutes an Essential Facility, But Cable Operators Have Created Bottlenecks to Such Access, in Part Through Prohibitively High Leased Access Rates Which Reflect the Operator's Market Power.**

10. The "essential facility" doctrine is an antitrust concept that arises when a monopolist controls some facility or resource that is "essential" to effective competition -- that is, essential in the sense that a particular business must have access to the resource in order to compete in any meaningful way in the market to which access is blocked. Leading cases elucidating this concept include United States v. Terminal R.R. Association, 224 U.S. 383 (1912) (exclusion of railroad lines from terminal facility); Otter Tail Power Company v. United States, 410 U.S. 386 (1973) (refusal of a near-monopoly electric utility to wheel power for competing publicly-owned utility over its electric transmission lines); Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509 (10th Cir. 1984), *aff'd on other grounds,* 472 U.S. 585 (refusal of owner of three out of four ski slopes on single mountain to include competitor's slope within multi-run ski lift packages); Fishman v. Wirtz, 807 F.2d 520 (7th Cir. 1986) (refusal of access of team to professional sports arena), and MCI Communications Corp. v. AT&T Co., 708 F.2d 1081, 1132 (7th Cir.) *cert. denied*, 464 U.S. 891 (1983) (denial of local telephone access to a competitor in the long distance telephone market). Another interesting case, Gamco v. Providence Fruit and Produce Building, 194 F.2d 484 (1st Cir.) *cert. denied*, 344 U.S. 817 (1952), involved the refusal of a wholesale produce warehouse to lease space in the only such facility in town to a produce wholesaler which was considered

undesirable by other tenants because of its pricing policies, which was held to be a violation of section two of the Sherman Act (15 U.S.C. § 2), the anti-monopolization provision.

11. As set forth in the MCI case, proof of unlawful monopolization under the essential facilities doctrine includes (1) control by a monopolist of an essential facilities or resource serving the monopolist's market; (2) a competitor's inability. practially or reasonably to duplicate the essential facility: (3) denial of access or use of the facility to the competitor; and (4) the feasibility of providing the needed access to the facility. In the case of cable leased access channels, they are clearly under the control of a monopolist/monopsonist. Also, programmers who wish to compete with programming already available to subscribers through the system are unable, as a practical matter, to duplicate the system, which is granted by municipal or other franchise, and have no other alternative which provides the same level or degree of potential market accessibility.[6] Through either supra-competitive rates or other anticompetitive practices as detailed in the legislative history[7], various unaffiliated programmers have been denied access to this resource, although it would have been entirely feasible for the cable operator to provide such access.

12. It is HITN's position that, inasmuch as cable operators appear to have exploited their monopoly/monopsony position to deny access to their essential facility to

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[6] Thus, under this doctrine, neither ITFS or other low power TV service, would not be considered a reasonable or practical duplicate for access to cable distribution either in terms of market penetration or geographic coverage.

[7] House Committee on Energy and Commerce. H.R. Rep. No. 628, 102d Cong., 2d Sess. (1992) (hereafter "House Report") at 39.

unaffiliated programmers, the cable systems should not reap a windfall from leased access users by means of any fee formula which reflects or allows recoupment of monopoly-derived profits. Other anticompetitive practices by some cable operators may have included attempts to leverage their regulated monopoly in order to achieve market power in the either the programming or leased access markets. For further discussion of these issues, HITN refers to and incorporates into these its comments a law review article which deals with these issues in great detail. See, Lampert, Donna A., "Cable Television: Does Leased Access Mean Least Access?" 44 Fed. Com. L.J. 245 (March 1992).

## IV. IN THIS PROCEEDING, THE COMMISSION'S PRIMARY FOCUS SHOULD BE UPON THE CONGRESSIONAL POLICY TO FOSTER COMPETITION AND DIVERSITY RATHER THAN THE FINANCIAL WELL-BEING OF CABLE OPERATORS.

13. At various points throughout its Order, the Commission states its concern with not requiring cable operators to "subsidize" leased access programmers. The Commission continually states its intention to balance the Congressional objective of increasing and promoting competition and diversity in the cable TV market through regulation of leased access against a what it considers to be a continuing obligation to do so "in a manner consistent with growth and development of cable systems." See, e.g., Order on Reconsideration at 23 - 26. HITN believes, however, that the Commission may have misinterpreted the intent of Congress as it applies to the cable programming market in 1996 (or in 1992, for that matter).

14. Congress' express concerns in the 1992 amendments was to use leased access "to remedy market power in the cable industry" and to act as "an important safety

valve for anticompetitive practices by the cable operator."[8] The Commission's statutorily-derived mission is to promote these goals in a manner "consistent with" cable growth. This term, "consistent with" does not necessarily mean, however, to **promote** cable growth and development but, rather, to develop regulations and rates which reflect and **are consistent with** the current effective stage of cable growth and development. Inasmuch as that growth and development is currently one of a comfortable level of subscriber penetration **along with monopoly/monopsony market power**, the Commission's appropriate role is no longer to foster cable system growth. That growth has now been recognized by Congress as having reached a level where competition and diversity are needed to check that very cable growth, that is, monopoly market power. The Commission's present mandate is to promote competition and diversity **in order to counteract** monoplistic growth and the development of cable sustems abuses and anticompetitive practices.

15. To the extent that the Commission's proposed cost/market rate formula reflects any remaining concerns with adequately compensating cable operators for a so-called "loss" of the financial benefits of their anticompetitive abuses, that formula will fail to satisfy the Congressional intent. As the Commission itself recognizes in its Order on Reconsideration (at page 25), Congress believed that cable operators had been allowed to control the price and conditions for leased access and had, accordingly, made the price too high and the conditions too onerous. These systems should not reap additional and continued benefit from these former abuses.

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[8] S. Rep. No. 92, 102d Cong., 1st Sess., (1992) (hereafter, 1992 Senate Report) at 30, 32, as cited in Order on Reconsideration at 24.

16. HITN agrees, in general, with the Center for Media Education and Paradise Television Network that the actual incremental cost and overhead associated with carrying the leased access signal should provide the basis for the rate formula(s) to be established. These rates should certainly be below the average implicit fee because the goals of diversity and competition require that cable operators no longer charge prohibitive tolls to allow their competitors access through the bottleneck. In this regard, HITN urges the Commission to reconsider its rationale for the market rate portion of its formula for leased access once a system's set aside has been met: all the Commission is accomplishing with this aspect of the formula is stimulating competition among leased access programmers as to who can offer the monopolist/monopsonist the highest inducement to open the bottleneck, a bottleneck of its own creation. That is, the Commission's formula would stimulate competition only among unaffiliated programmers, competing among themselves to give the cable system the highest possible financial reward for having exploited its monopoly. This cannot have been the intent of Congress in advocating greater competition in the cable market. Rather, the area of effective competition to which Congress directed the Commission's attention was competition between system-affiliated and -unaffiliated programmers. The market-based rate and any rate that includes consideratioan of "lost opportunity costs" misses the point of the Congressional goals, fail to serve those goals, and should be reconsidered.

## V. A SPECIAL SET-ASIDE SHOULD BE CREATED FOR NOT-FOR-PROFIT PROGRAMMING ENTITIES AND THE RATES FOR ACCESS TO SUCH CHANNELS SHOULD BE NOMINAL AND BASED UPON CERTAIN SPECIFIC COSTS.

17. The Commission has requested comment regarding whether it should provide what it terms "preferential treatment" for not-for-profit programmers that seek cable leased access. Specifically, comment is requested regarding whether a specific set-aside, as a subset within the 15% statutory set-aside of all leased access channels, should be required. Comment is also requested regarding whether not-for-profit programmers should pay lower rates or whether rates offered to such programmers should be calculated on a different basis from the cost/market rate formula.

18. HITN supports the creation of a specific set-aside for not-for-profits as a subset of all leased access channles, as well as the establishment of a separate cost-based nominal rate formula for leased access transactions involving not-for-profit programmers. HITN also urges that the Commission recognize the particular Congressional intent to promote cable access for educational and minority programmers and incorporate the policies underlying that statutory intent into its regulatory framework for not-for-profit access. This not-for-profit set-aside and separate rate formula are necessitated for several reasons, which will be discussed in detail here.

### A. A Market-Based Rate Will Effectively Exclude Not-for-Profits from Access.

19. As a starting point for considering rates and not-for-profit access, HITN notes that the Commission has proposed competition among leased access providers as the basis upon which will be determined the "market rate" once any programmer's 15% set-aside has been reached. Obviously (and aside from the policies which militate

against such a rate formula) no not-for-profit programming entity would be able to compete for leased access on such terms. For this reason, not-for-profits need to be assured of a definite set of channels to which they can obtain access at rates they can realistically afford. Otherwise, the entire notion of leased access for not-for-profit programs is a sham.

20. Second, even the cost-based formula proposed by the Commission for setting rates within the 15% set-aside might be too high for many not-for-profits to afford. The pent-up demand for cable access among for-profit programmers is potentially very great. How can not-for-profits be expected to compete effectively with what one must assume are better-funded and, perhaps often, nationally-based programming networks within that general pool? Again, without a specific set-aside and a separate rate formula, not for-profits will not be a presence in cable programming, even under the new policies and rate formulae.

**B. Rates Charged to Not-for-Profits Should Reflect Congressional Policies to Promote Competition and Diversity As Well As General Public Interest Standards.**

21. Third, the rates proposed by the Commission may be too high for not-for-profits precisely because cable operators have been disregarding their statutory obligation to provide leased access for many years. Lower or even nominal rates for non-profits represent not a subsidy but, rather, a reasonable means for cable operators to catch up with their long-neglected statutory, regulatory and societal obligations. The cable operator is not entitled to continue to reap monopoly profits when dealing any unaffiliated programmer, but most particularly not with non-profit entities. Non-profit

programmers, particularly those whose focus is educational, bring great diversity as well as quality-based competition to the cable program market. Diversity in programming, as a Congressional policy, should mean something more than another offering of "Bewitched", "I Dream of Jeannie", or old movies, with or without Spanish-language captions. Programmers like HITN bring educational values as well as much-needed diversity to the cable spectrum. To allow cable operators to recoup supposedly lost "opportunity costs" through their cost-based rates within the set-aside or to give them the opportunity to manipulate rates by manipulating which channels may or may not be available for non-profit leased access would be to undermine the pro-diversity legislative goals. Operators should not be permitted to reap financial rewards at the expense of non-profit access, either by playing games with their channel designations, or using opportunity costs to which they were not entitled in the first place, because they had never previously satisfied their leased access set-aside.

### C. Not-for-Profit Access to Cable Is Analogous to Public Broadcasting Interconnection.

22. An analogous policy-based FCC precedent exists for requiring some degree of preference for non-profits by lowering rates to permit effective non-profit access to monopolized facilities. Authority for such policies exists under the general rubric of the Commission's authority to regulate in the public interest. The directly-analogous example proposed by HITN occurred in 1969 when, despite a clear Congressional mandate to provide land lines interconnections for the new public broadcasting entities, AT&T dragged its feet, provided less-than-optimal interconnections, and continually pre-empted public broadcasting's signal, often without notice, in favor of commercial

interconnections. See, generally, In the Matter of Free or Reduced Rate Interconnection Service for Noncommercial Educational Broadcasting (Docket No. 18316), 20 F.C.C.2d 491 (November 7, 1969). In that Memorandum Opinion and Order, the Commission ordered AT&T to provide interconnection common carrier services to noncommercial educational broadcast entities that was comparable in all respects to that provided to commercial broadcasters and, further, ordered AT&T to do so either for free or at reduced rates. The policy basis for that order, derived in part from the Public Broadcasting Act of 1967, 47 U.S.C. 391 *et seq.*, and in part from the Commission's general duty and authority to regulate in the public interest, was that its was

> required **in the public interest** that free or reduced rate interconnection common carrier services be provided for public broadcasting . . .

20 F.C.C.2d at 492.

24. The public interest being served by the declaratory order was found in the Public Broadcasting Act, which had established "national policy that the public interest is served by the expansion of noncommercial educational broadcasting service to the public through free or reduced rates interconnection services for educational broadcast stations." Id., at 492-493. The Commission therefore required AT&T to offer such interconnection through its land lines (and later via satellite distribution) for free or at nominal rates to public broadcasting entities.

25. The analogy is a direct one. Congress has now established a policy that favors competition and diversity in cable programming, to be achieved through mandatory leased access. Cable operators are required to offer such access, but are fortunate in that they need only provide a 15% set aside for leased access exclusively.

To achieve these legislative policy goals, which are clearly in the public interest as an expressed national policy of the Congress, the Commission has the authority to set rates. Those rates must further these Congressional policies, just as AT&T was required to offer free or nominal interconnections in 1969 to serve the policy that favored public broadcasting.

26. Congress has also expressed a policy, in section 612(i) of the Communications Act (47 U.S.C. §532(i), favoring access by qualified educational and minority programmers, which will permit a cable operator to place programming from such sources on up to 33 percent of the cable systems' designated leased access channels. The Commission has determined that "programming that covers 'minority viewpoints' or is 'directed at members of minority groups' must cover the viewpoints of, or be targeted to, members of minority groups, as defined in section 309(i)(3)(c)(ii) of the Communications Act. Order on Reconsideration at 120-121. That order also states that: "Program sources that devote 90 percent or more of their programming to such purposes may qualify as a statutory source of minority or educational programming." Section 612(i)(3) defines a "qualified educational programming source" as one that "devotes substantially all of its programming to educational or instructional programming that promotes public understanding of mathematics, the sciences, the humanities, and the arts, and has a documented annual expenditure on programming exceeding $15,000,000." Such minority or educational entities may, under section 612(i), be substituted by cable operators for leased access programs.

27. HITN would certainly qualify as a minority programmer under the statutory definition and, without consideration of the annual budget aspect of the definition, it qualifies as an educational broadcaster, since substantially all of its programming promotes the humanities and the arts. Why should not a not-for-profit entity, which meets these criteria which have been used to permit for-profits like BET and the Discovery Channel to be substituted for leased access, be granted preference via a specific set aside, at lower rates than charged to for-profits, when its programming will serve the same policies in the public interest? HITN submits that not-for-profit entities, particularly those which would qualify as serving educational and/or minority interests, should be entitled to a specific subset within the designated set-aside for leased access. That designated non-profit set-aside should be at least 33% of the total number of designated channels. Furthermore, in order to further the public interest, as expressed by Congress, of diversity in cable programming and access to educational and minority programming, such access should be at nominal rates, affordable by a not-for-profit. To do otherwise would be to make it impossible to fulfill the expressed Congressional intent.

## VI. THE COMMISSION SHOULD ADOPT MEANINGFUL REPORTING REQUIREMENTS AND SHOULD STRENGTHEN, NOT DILUTE, ITS DISPUTE RESOLUTION AND OTHER REGULATORY MECHANISMS TO CURB ABUSES BY CABLE OPERATORS.

HITN files the following comments in response to specific issues raised for comment by the Commission in its Order on Reconsideration.

### A. Disclosure of Information.

28. Cable operators should be required to publish and provide a schedule of

rates to leased access users upon request and in a timely manner --within at least seven days. A cable operator should also be required to file materials which support its calculation of rates, as was proposed by CME. HITN supports these concepts and urges the Commission to adopt rules to require this type of disclosure. The rationale in support of disclosure is as follows:

29. First, it is a basic economic principle that the better and freer the level of communication within a market and the more accurate the information available to buyers and sellers in that market, the better the market will function. Since the Commission seems committed to some level of interplay of market forces in the setting and negotiation of certain rates, the participants in those markets should have access to as much information as possible. How can effective competition and negotiation take place when the cable operator keeps necessary and important information hidden from its programming competitors/leased access customers when they seek leased access? Information makes a market function better, it does not "wreak havoc" in a marketplace, as CVI claims (unless, of course, by the term "havoc" CVI means competition with the cable operator).

30. Second, as the 1992 House and Senate Reports noted, there is some reason to be suspicious of the rate-setting practices of the cable operators over the past several years. To require disclosure of the calculations underlying rates would go far to bring such practices to a halt For these reasons, HITN supports the Commission's clarification and modification of Section 76.970 (e) of the Commission's rules to require

operators to provide requested information to programmers within seven days and urges the Commission to adopt CME's position with respect to what must be disclosed.

**B. Part-Time Access on Fair and Equal Terms**

31. Cable operators should be required to accommodate part-time as well as full-time lessees. This is an additional and effective means to promote diversity of programming and of program sources and will permit less affluent and start-up programming operations to gain access to the cable market. An explicit or implicit requirement that would bar or make more difficult market entry on anything other than a total full-time basis should be considered anticompetitive and therefore prohibited. Thus, if it is fair and not, in effect, a *de facto* means of barring part-time access, some differential based upon time of day might be acceptable, but the Commission should be wary of possible manipulation by cable operators.

**C. Billing and Collection Services.**

32. Cable operators should be required to provide billing and collection services for leased access cable programmers at reasonable rates. HITN supports continued regulation by the Commission to ensure that such services will be available. However, HITN does not share the Commission's faith that market forces will miraculously cause cable operators to provide such services at "reasonable rates." HITN instead urges the Commission to regulate rates for such services and to provide for cost-based billing and collection services, particularly when the programmer is a not-for-profit entity eligble for reduced leased access rates and the non-profit set-aside.